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No. 94-____

In the
Supreme Court of the United States
October Term, 1994

N.C. DEPARTMENT OF AGRICULTURE,
Petitioner,

v.

CHARLES W. PARKER,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. What is the proper formulation of the fourth element of the plaintiff's McDonnell Douglas prima facie case where the hiring or promotion decision does not involve continued recruitment and the position does not remain open?

2. Where a plaintiff alleges that he was denied hire or promotion on the basis of his race, the applicant pool consists of more than two applicants, and selection of the successful applicant and rejection of the other applicants occurs simultaneously, so that no continued recruitment occurs, is the fourth prong of the McDonnell Douglas test met simply by proof that an applicant not of the plaintiff's race was selected?

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N.C. DEPARTMENT OF AGRICULTURE,
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PETITION FOR WRIT OF CERTIORARI

The Defendants/Appellees, the North Carolina Department of Agriculture, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals panel is reprinted at pages 1A-9A of the appendix to this petition. The order

of the court of appeals en banc denying the state appellee's petition for a rehearing and suggestion for rehearing en banc are reprinted at pages 11A-12A of the appendix. The district court's order dismissing the complaint and entering judgment for the Defendant/Appellee are reprinted at pages 13A-19A.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1994. The court of appeals denied rehearing and rehearing en banc on December 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case involves the proper constitution of the plaintiff's prima facie case in where discrimination in hiring or promotion is alleged and the position neither remains open nor does the employer continue to recruit applicants after rejecting the plaintiff. The Plaintiff filed a complaint which alleged only that he was black, that he applied for a chemistry technician position, that he was one of four candidates, two of which were white and two of which were black, and that he was not selected for the position. Upon motion of the defendant, the district court dismissed the complaint for failure to state a claim for which relief could be granted. App. 13A-19A.

On appeal, the Fourth Circuit Court of Appeals reversed the district court finding that this Court's opinions in both McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) and Patterson v. McLean Credit Union, 491 U.S. 164 (1989) required the Court to find that a plaintiff established

a prima facie case of employment discrimination when he alleged that he was a member of a protected class, that he applied and was qualified for a position, that he was rejected and that the employer either continued to seek applicants for the position or filled it with an applicant who was white. App. 1A-10A.

The court of appeals declined to rehear the case. App. 11A-12A.

REASONS FOR GRANTING THE WRIT

This Court should issue its writ of certiorari for four reasons: first, the decision of the court of appeals is in conflict with decisions of this Court regarding the proper formulation of the plaintiff's prima facie case in this particular fact situation; second, the decision of the court of appeals is in conflict with decisions of other circuit courts of appeals on this same issue; third, the court of appeals has refused to address or resolve the conflict in the fourth circuit between two different decisions which formulate the requirements of the prima facie case in opposing ways; and finally, the conflict within the fourth circuit mirrors the conflict between both district courts and courts of appeals in other circuits on this same issue.

I. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS BY THIS COURT ON THE PROPER FORMULATION OF THE PLAINTIFF'S PRIMA FACIE CASE IN A HIRING AND SELECTION SITUATION WHERE NO POSITION REMAINS OPEN AND THE

EMPLOYER DOES NOT CONTINUE TO RECRUIT AFTER THE PLAINTIFF'S REJECTION.

This Court should grant its writ of certiorari to resolve a conflict between the Court of Appeals' decision below and this Court's decisions, inter alia, McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); and Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In the first three of these cases, McDonnell Douglas, Furnco, and Burdine, this Court created, gave purpose to, and refined the prima facie case as an alternative method of proof for employment discrimination plaintiffs lacking direct or indirect evidence of discrimination.

In the fourth case, Patterson, this Court, in dicta, used language which has been held to reformulate the plaintiff's burden of proof in hiring or promotion cases and requires the plaintiff only to adduce evidence, in any hiring or promotion situation, that plaintiff was rejected and an applicant not in plaintiff's protected class was selected. Because such a formulation both fails to meet the purpose for which this Court created it, the decision of the court of appeals below is in conflict with decisions of this Court.

A. THIS COURT CREATED THE PRIMA FACIE FOR A SPECIFIC PURPOSE.

In McDonnell Douglas, the plaintiff, a mechanic who had been laid off from his job with McDonnell Douglas, applied for a mechanic's job in response to an advertisement

for mechanics by McDonnell Douglas. He was rejected allegedly because he had participated in unlawful conduct with regard to union activities vis a vis McDonnell Douglas. This Court held that the plaintiff could have carried his initial burden of establishing a prima facie case of racial discrimination under Title VII by showing:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. at 802. In a footnote, the Court noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." Id. fn 13.

Five years later, in Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978), the Supreme Court again addressed the elements of a prima facie case. The plaintiffs in Furnco were bricklayers who were denied employment under circumstances similar to that in McDonnell Douglas, i.e., the employer engaged in continued recruitment of persons of similar qualifications after rejecting plaintiffs.

In holding that plaintiffs had proven a prima facie case, the Court expressly readopted both the McDonnell Douglas concept of a plaintiff's prima facie case and the

footnote which clearly contemplated variation in the formulation of the prima facie case according to the facts of a case. Id. at 576. More importantly, however, the Court also reemphasized the true purpose of a plaintiff's prima facie burden:

> McDonnell Douglas did make clear that a Title VII plaintiff carries the initial burden of showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were "based on a discriminatory criterion illegal under the Act."

Id. (Citation omitted). The Court further explained:

> The method suggested in McDonnell Douglas for pursuing this inquiry [of whether the employer is treating some people less favorable on a basis prohibited by Title VII], however, was never intended to be rigid, mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination. A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [Citation omitted.] And we are willing to presume this largely because we know from our experience that more often

> than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Id. at 577.

Thus, in both McDonnell Douglas and Furnco, the Court established unequivocally that the purpose of a plaintiff's prima facie case is **to raise an inference of discrimination** by eliminating the defendant's legitimate reasons for rejecting an applicant. Moreover, in both cases, the facts which raised the inference of discrimination were that the position sought by the plaintiffs remained open and the employers continued to recruit other similarly qualified persons after rejecting the qualified plaintiffs. Notably, in cases like the one below, which involve a closed applicant pool and the simultaneous selection of a successful applicant and rejection of all other applicants, no position remains open and the employer does not engage in continued recruitment.

B. A PLAINTIFF MUST SHOW THAT HIS REJECTION OCCURRED UNDER CIRCUMSTANCES GIVING RISE TO AN INFERENCE OF DISCRIMINATION.

Some three years after this Court decided Furnco, this Court reiterated the purpose of a plaintiff's prima facie case in a different factual situation more like the one at issue in the case below. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). In Burdine, the plaintiff alleged that her employer both failed to promote her and later terminated her based on gender discrimination. Once again, the Burdine Court reaffirmed the requirements of a plaintiff's Title VII prima facie case in a promotion or hiring situation: "The plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." Id. at 253.

The Court found that Burdine had made out a prima facie case when she showed that "she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male . . . who had been under her supervision." Id. fn 6. In finding that plaintiff's evidence, in the face of the employer's silence, made out a prima facie case of discrimination in the promotion context, the Court noted that plaintiff applied for a position, that the position remained open, and that eventually plaintiff was rejected in favor of a male who had been under plaintiff's supervision. The Court did not find, however, that the plaintiff's mere rejection in favor of a male applicant raised an inference of discrimination.

In readopting the Furnco Court's explanation of the purpose of the prima facie case, the Burdine Court also noted that:

> [e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for plaintiff because no issues of fact remains in the case.

Id. at 254.

In summary, the McDonnell Douglas, Furnco and Burdine Courts made it clear that a plaintiff's prima facie case must, first, incorporate circumstances which eliminate the most common legitimate reasons for the adverse employment decision (e.g., lack of qualifications, absence of available position, lack of application) and second, incorporate employer actions or other circumstances, which if unexplained, give rise to an inference of unlawful discrimination.

C. THE MERE FACT THAT AN APPLICANT NOT IN PLAINTIFF'S PROTECTED CASE IS SELECTED AND PLAINTIFF IS REJECTED, IS INSUFFICIENT TO RAISE A LEGALLY SUFFICIENT INFERENCE OF DISCRIMINATION WHERE NO POSITION REMAINS OPEN AND NO CONTINUED RECRUITMENT OCCURS.

The decision below which required only that a plaintiff show that a white applicant was selected instead of himself fails to raise an inference of discrimination where the

facts show that there were other black and white applicants in the applicant pool and the selection of a white applicant occurred simultaneously with the rejection of not only plaintiff, but all other applicants, both black and white. In such a case, the mere fact that an applicant of another race was selected does not raise an inference of discrimination sufficient to require a court to enter judgment in plaintiff's favor in the face of employer silence.

The only support for a finding that a plaintiff can establish a prima facie case with such a showing is dicta in this Court's opinion in Patterson v. McLean Credit Union, 491 U.S. 164 (1989). In Patterson, the Court discussed the elements of the proof scheme established under McDonnell Douglas and Burdine only incidentally when holding primarily that jury instructions given in the plaintiff's § 1981 action were in error because they required plaintiff to show she was better qualified than, and not as equally qualified as, the successful applicant.[1] Specifically, this Court stated that in order to make out a prima facie case of discrimination in a failure to promote or hiring case, a plaintiff "need only prove by a preponderance of the evidence that she applied for and was qualified for an available position, that she was rejected, and that after she rejected respondent either continued to seek applicants for the position, or, as is alleged here, filled the position with a white employee." Id. at 186-187.

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[1] This dicta was relied upon by the Fourth Circuit in another case, Blue v. Dep't of Army, 914 F.2d 525, 536 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991), which the court below cited in support of its holding.

As stated above, however, the problem with allowing the simultaneous rejection of a minority applicant and hiring of another nonminority applicant to constitute the last prong of a plaintiff's prima facie case is that such a circumstance does not raise an inference of discrimination comparable to the McDonnell Douglas circumstance of rejection of a qualified applicant and continued recruitment.

Under the McDonnell Douglas and Furnco factual scenarios, the employer's recruitment process consisted of open posting and continuous recruitment with a minimum level of qualifications. However, in the case at bar and in Burdine, the employer's recruitment process consisted of a closed applicant pool with the employer requiring one level of minimum qualifications in order to be considered for the available position and then evaluating within the pool between the minimally qualified applicants' various qualifications.

The reason the Court found that "continued recruitment" permitted an inference of discrimination in McDonnell Douglas and Furnco, is because such a circumstance constituted an "employer action" which, if unexplained, would give rise to an inference of discrimination. Again, as the Furnco court explained,

> A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. [Citation omitted.] And we are willing to presume this largely because we know from

> our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race.

Furnco, 438 U.S. at 577. Common sense and experience suggests that an employer who has chosen to recruit via an open posting with a single level of evaluation based on certain minimum qualifications, does not have a legitimate business reason for rejecting an applicant who meets the posted minimum qualifications. Thus, rejection of a qualified minority applicant and continued recruitment of similarly qualified applicants would suggest that the employer "based his decision on an impermissible consideration such as race." Id.

However, in a recruitment process which does not utilize open postings with a single level of evaluation based on certain minimal qualifications, an entirely different analysis takes place. Moreover, no position remains open and the employer does not continue to recruit after the simultaneous selection of the successful applicant and the rejection of the plaintiff. Where, as in Burdine, a recruitment process utilizes a closed applicant pool and the employer requires one level of minimum qualifications in order to be considered for the available position and then evaluates within the pool between the minimally qualified applicants'

various qualifications, as the Burdine Court held, "plaintiff must prove by a preponderance of the evidence that she applied for an available position for which she was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination." 450 U.S. at 253.

This Court's writ of certiorari is properly issued to address the conflict in this case between the decision below and this Court's previous decisions regarding the purpose of the prima facie case. See United States v. Doe, 465 U.S. 605, 610 (1984)(this Court granted its writ of certiorari "to resolve the apparent conflict between the Court of Appeals holding and the reasoning underlying this Court's holding in Fisher"); McDaniel v. Sanchez, 452 U.S. 130, 136 (1981)(-wherein certiorari was granted because of the important question presented and "because the answer suggested by our prior opinions is not free of ambiguity.")

Because the court of appeals misapprehended dicta in this Court's opinion in Patterson, this Court should grant its writ of certiorari and reaffirm its holdings in McDonnell Douglas, Furnco, and Burdine that the plaintiff's prima facie case, although not onerous, is not meaningless and plaintiff's evidence must raise an inference of discrimination in order to meet its evidentiary burden under the prima facie case proof scheme or otherwise.

II. THE COURT OF APPEALS' DECISION IS IN CONFLICT WITH DECISIONS BY OTHER CIRCUITS ON THE PROPER FORMULATION OF THE PLAINTIFF'S PRIMA FACIE CASE IN A HIRING AND SELECTION SITUATION WHERE

NO POSITION REMAINS OPEN AND NO CONTINUED RECRUITMENT OCCURS.

This Court should also issue its writ of certiorari to review the decision below because it conflicts with the decisions of other circuit courts of appeal. See McElroy v. United States, 455 U.S. 642, 643 (1982)(certiorari granted because of "a conflict among the Circuits"); Marks v. United States, 430 U.S. 188, 189 (1977)(certiorari granted "to resolve a conflict in the Circuits"). In order to appreciate this conflict, however, it must be noted that the decision below also directly conflicts with another fourth circuit case decided en banc which the fourth circuit has declined to overrule. Holmes v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986).

A. THE FOURTH CIRCUIT HAS HELD IN HOLMES V. BEVILACQUA THAT PROOF THAT ANOTHER APPLICANT NOT OF THE PLAINTIFF'S RACE WAS SELECTED WAS NOT SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE.

In Holmes v. Bevilacqua, in a closed applicant pool promotion situation, the Fourth Circuit reconsidered a panel's decision and held, consistent with the dissent to the original panel's decision, that in order to establish a prima facie case of employment discrimination in a hiring and promotion situation with a closed applicant pool and no open position or continued recruitment after the plaintiff's rejection, modification of the fourth element of the prima facie case was necessary. In addition to the first three elements of the McDonnell Douglas prima facie case: "(i) that he belongs to

a racial minority; (ii) that he applied and was qualified for the job for which the employer was seeking applicants; [and] (iii) that, despite his qualifications, he was rejected," id. at 146, the plaintiff was required to show "some other evidence that his race was a factor considered by his employer in not granting him the promotion. There must be some evidence that race was a determining factor in the employer's decision." Id. at 147.

The court rejected the idea that the plaintiff could make out a prima facie case simply by showing that someone not of his race received the promotion. As the Court explained:

> Without the fourth prong of the McDonnell Douglas proof scheme, any qualified minority applicant who is denied promotion could make out a prima facie case by merely proving his race, his qualifications, and his failure to be promoted. The proof of the first three prongs of the scheme only set the stage for the fourth, which tips the scale in favor of a prima facie case, because the fourth prong requires proof that points toward illegal discrimination. In U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), the Court stated that the McDonnell Douglas proof scheme does not require direct proof of discrimination to prove a prima facie case of discrimination, but it did not find the first three prongs to be sufficient. In Lovelace we held that a plaintiff may establish his discrimination case through the cumulative effect of

> indirect evidence of the employer's motivation. In the present case plaintiff has failed to present any evidence, direct or indirect, of racial discrimination in the defendant's decision to promote [the successful applicant] and not to promote plaintiff. Without this element, plaintiff did not make out a prima facie case and is not entitled to the presumptions that would accompany such a case.

Id. Thus, in Holmes, the fourth circuit, sitting en banc held that the mere fact that a minority applicant applied, is qualified and the employer failed to promote him is insufficient to establish a prima facie of discrimination. Id.

B. THE TENTH CIRCUIT HAS ADOPTED THE HOLMES V. BEVILACQUA APPROACH.

The Court of Appeals for the Tenth Circuit has also followed the approach of Holmes v. Bevilacqua.[2] In Notari v. Denver Water Dep't, 971 F.2d 585 (10th Cir. 1992). Citing to Holmes, the court adopted "the set of prima facie case alternatives that the Fourth Circuit has outlined." Id. at 590. In addition, the Notari court indicated explicitly that it is insufficient for a plaintiff

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[2] The United States District Court for the Northern District of New York opined, however, in 1987 that the Tenth Circuit had joined the Ninth Circuit in taking an approach not consistent with the Holmes approach. See Aguirre-Molina v. N.Y. State Div. of Alcoholism, 675 F. Supp. 53, 58 (N.D. N.Y. 1987).

> merely to allege that he was qualified and that someone with different characteristics was the beneficiary of the challenged employment decision. Instead, the plaintiff must allege and produce evidence to support specific facts that are sufficient to support a reasonable inference that but for plaintiff's status the challenged decision would not have occurred.

Id. See also Shapolia v. Los Alamos Nat'l Laboratory, 992 F.2d 1033, 1038 (10th Cir. 1993) (religious discrimination case wherein court held that to establish a prima facie case "the plaintiff must show (1) that he was subjected to some adverse employment action; (2) that, at the time the employment action was taken, the employee's job performance was satisfactory; and (3) **some additional evidence to support the inference that the employment actions were taken because of a discriminatory motive** based upon the employee's failure to hold or follow his or her employer's religious beliefs." (Emphasis added.))

C. THE EIGHT CIRCUIT HAS DECLINED TO FOLLOW THE HOLMES V. BEVILACQUA FORMULATION OF THE PRIMA FACIE CASE.

The Eighth Circuit has determined that in order to establish a prima facie case and, therefore, raise an inference of discrimination, a plaintiff must only show that he was a member of a protected class, that he was qualified for the position, that he was rejected for the position, and that someone not in the plaintiff's protected class was promoted

instead. Bell v. Bolger, 708 F.2d 1312, 1316 (8th Cir. 1983). The Postal Service argued that, under Burdine, the plaintiff was required to present evidence in his prima facie case that he was rejected "under circumstances which give rise to an inference of unlawful discrimination." Id. (quoting Texas Dep't of Community Affairs, 450 U.S. 248, 253 (1981)). Instead, the Boger court rejected the employer Postal Service's argument that more was required under the particular fact situation, noting that under Burdine, the "burden of establishing a prima facie case of disparate treatment is not onerous." Id. at 1317 (quoting Burdine, 450 U.S. at 253).

Citing Bell, lower courts in the Eight Circuit have explicitly noted the conflict between the Fourth Circuit and the Eight Circuit's formulation of the plaintiff's prima facie case. See Colon v. Sorenson, 668 F. Supp. 1319, 1321 (D. Neb. 1987)("Not only does the Holmes [v. Bevilacqua, 794 F.2d 142, 147 (4th Cir. 1986)] case rigidly apply the flexible elements of McDonnell Douglas to promotion facts, (citation omitted), but it is not the law in this circuit.")

D. THE NINTH CIRCUIT HAS NOT FOLLOWED THE HOLMES V. BEVILACQUA APPROACH.

The Ninth Circuit has held that the fourth element of the McDonnell Douglas test is met if the plaintiff shows that the position remained open after the rejection of the plaintiff and "someone else was ultimately selected." Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986). This approach does not comply with the Burdine opinion's mandate that the plaintiff's evidence presented in

his prima facie case raise an "inference of unlawful discrimination." Burdine, 450 U.S. at 253.

E. OTHER CIRCUITS HAVE NOT ADDRESSED THE CONFLICT AS EXPLICITLY, BUT APPEAR TO HAVE ADOPTED ONE APPROACH OVER THE OTHER.

1. The Sixth Circuit

The Sixth Circuit has specified the McDonnell Douglas formula as appropriate for a "failure-to-hire" case, but has also indicated its adoption of this Court's language in Burdine concerning the ultimate purpose of the prima facie case. Terbovitz v. Fiscal Court of Adair Co., Ky., 825 F.2d 111 (6th Cir. 1987). The court specifically adopted the McDonnell Douglas formulation of the prima facie case: "[i]n a "failure to hire" case such as this one, the plaintiff may satisfy this burden by proving: (1) that she is a woman; (2) that she applied and was qualified for the open position; (3) that she was rejected; and (4) that, after her rejection, the employer continued to seek applications from persons of plaintiff's qualifications." Id. at 114 n.2 (citing McDonnell Douglas, 411 U.S. at 802).

While the Sixth Circuit has not addressed the proper formulation of the prima facie case where no position remains open and the employer does not continue to recruit addressed in Holmes v. Bevilacqua, the Terbovitz court recognized the ultimate purpose of the prima facie case: "[a] Title VII plaintiff establishes a prima facie case by proving

facts that give rise to an inference of unlawful discrimination." Id. (citing Burdine, 450 U.S. at 253-54). Furthermore, in explaining that where a plaintiff utilizes direct evidence to prove his case, resort to the alternative "evidentiary path" of the McDonnell Douglas formulation is not necessary as it is simply a different method "by which to resolve the ultimate issue of defendant's discriminatory intent." Id. at 115. In affirming the purpose of the prima facie case, the court explained:

> Direct evidence of discrimination, if credited by the fact finder, removes the case from McDonnell Douglas because the plaintiff no longer needs the inference of discrimination that arises from the prima facie case. Upon crediting the plaintiff's direct evidence, the district court finds facts requiring the conclusion that unlawful discrimination was at least a "motivating factor" for the employer's actions. (Citation omitted.) The existence of unlawful discrimination is patent, and if the employer does not propose an alternative explanation for its actions, Title VII liability will automatically follow.

Id. See also Gafford v. Gen. Electric Co., 997 F.2d 150, 169 (6th Cir. 1993)(finding that once "a prima facie case has been established . . . the defendant must then respond or face judgment for the plaintiff.")

Finally, unpublished dispositions in the Sixth Circuit have cited Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992)(plaintiff alleged discriminatory discharge, rather than

promotion) as support for a Holmes v. Bevilacqua-type formulation of the plaintiff's prima facie case in a hiring or promotion case: the court cited Mitchell and McDonnell Douglas in support of its holding that "the plaintiff was required to show that (1) he was a member of a protected class, (2) he applied and was qualified for a job for which the employer was seeking applicants, (3) he was rejected despite his qualifications, and (4) the circumstances give rise to an inference of discrimination." Wrenn v. Vanderbilt Univ. Hosp., 16 F.3d 1224, 1994 WL 28670 (6th Cir.1994)-(Table)(Unpublished Opinion), cert. denied, 115 S. Ct. 87, 130 L. Ed. 2d 39 (1994)(citing McDonnell Douglas, 411 U.S. at 802 and Mitchell, 964 F.2d at 582.) Thus, the Sixth Circuit appears to have taken a Holmes-like approach to the prima facie case although its cases speak only in terms of the McDonnell Douglas formulation of the test.

2. The Eleventh Circuit

The Eleventh Circuit has taken the approach supported by the Patterson dicta and allowed a plaintiff to establish a prima facie case by showing the first three prongs of the McDonnell Douglas test and then that "other equally or less qualified employees who were not members of the protected minority were **promoted.**" Batey v. Stone, 24 F.3d 1330, 1334 n.11 (11th Cir. 1994).

III. THE COURT OF APPEALS' DECISION REFUSES TO ADDRESS OR RESOLVE THE CONFLICT IN THE FOURTH CIRCUIT BETWEEN TWO DIFFERENT DECISIONS WHICH FORMULATE THE REQUIREMENTS OF THE PRIMA FACIE CASE IN OPPOSING WAYS.

Notwithstanding the obvious need for guidance from the court in the proper formulation of the prima facie test in this fact situation, the above-described conflict between the en banc opinion in Holmes v. Bevilacqua and the dicta in this Court's opinion in Patterson v. McLean Credit Union, was not resolved by the Fourth Circuit in the case below. In fact, in a per curiam unpublished opinion, the court of appeals below not only refused to overrule Holmes, reconcile it with Patterson or provide the practicing bar or bench with any guidance as to the correct view of the test.

This Court should grant its writ of certiorari to clarify a matter of recurring importance to all the circuits and especially to the bench and bar of the Fourth Circuit.

> Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari. See Davis v. United States, 417 U.S. 333, 340 (1974). As Justice Harlan once wrote, "decisions between different panels of the same Court of Appeals will not be considered to present a reviewable conflict, since such differences of view are deemed an intramural matter to be resolved by the Court of Appeals itself." (Citation omitted.) Such differences ordinarily are to be settled through an en banc sitting of the court of appeals or, as Justice Harlan suggested, through "later panels customarily deferring to the decisions of earlier panels."

Robert L. Stern et al, Supreme Court Practice 176 (1993). Nevertheless, the Fourth Circuit has not indicated a willingness to resolve the intracircuit conflict. Since the Patterson decision in 1989, two different panels have published decisions which rely on that dicta and conflict with the Holmes formulation of the prima facie case in hiring and promotion cases where no continued recruitment occurred and no position remained open after the plaintiff was rejected. See Carter v. Ball, 33 F.3d 450 (4th Cir. 1994); Blue v. United States Dep't of Army, 914 F.2d 525, 536 (4th Cir. 1990), cert. denied, 499 U.S. 959 (1991).

Despite the Defendant-Appellee's petition for rehearing and suggestion for rehearing en banc, the court of appeals declined to resolve a conflict between not just different decisions from different panels, but a conflict between an en banc decision and the decisions of two separate panels. App. 11A. In addition, the resolution of the conflict without the aid of the court itself is made more difficult by the fact that the logic and rigor of the analysis in the en banc decision in Holmes is more persuasive than the reliance upon dicta in either of the more recent panel decisions.

Because this "intracircuit conflict relates to a recurring and important issue [and] is accompanied by a 'widespread conflict among the circuits,'" this Court should grant certiorari. See Stern, supra at 176 (citing Commission v. Estate of Bosch, 387 U.S. 456, 457 (1967); John Hancock Ins. Co. v. Bartels, 308 U.S. 180, 181 (1939)(certiorari granted because of intracircuit conflict and the importance of the question); Dickinson v. Petroleum Conversion Corp., 338 U.S. 507, 508 (1950) (certiorari granted "because of this

intracircuit conflict"); Maggio v. Zeitz, 333 U.S. 56, 59-60 (1948)(certiorari granted because of intracircuit conflict); Scarborough v. United States, 431 U.S. 563, 567 n.4 (1977)(certiorari granted because of "split among the Circuits," one circuit being noted as having an intracircuit conflict.)

IV. THE CONFLICT WITHIN THE FOURTH CIRCUIT IS MIRRORED BY OTHER CONFLICTS NOT ONLY BETWEEN THE CIRCUITS BUT WITHIN OTHER CIRCUITS.

A. The First Circuit

In only one example, the First Circuit not only has opinions which reflect the approach of the en banc Holmes panel, but also opinions which appear to adopt the elements set forth in this Court's opinion in Patterson.

Like the Fourth Circuit, the First Circuit has taken both a Holmes-like approach to the formulation of the prima facie case and one which contemplates proof that the employer hired a particular person with the plaintiff's qualifications. Petitti v. New England Tel. and Tel. Co., 909 F.2d 28 (1st Cir. 1990).

Consistent with the Holmes approach and this Court's opinions in Burdine, the Petitti court summarized the requirements of the prima facie case as follows:

> Essentially, pursuant to the first three prongs of the McDonnell Douglas standard, in a discrimination claim alleging disparate treatment "the plaintiff must

> prove by a preponderance of the evidence that [he] applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of discrimination." Texas Dep't of Community Affairs v. Burdine, 450 U.S. at 253 (footnote omitted). **The fourth prong would require Petitti to show that he was not hired but for his gender.**

Id. (Emphasis added.) This approach is precisely like the approach of Holmes v. Bevilacqua: the fourth element requires some evidence to create a legally sufficient inference of prohibited discrimination. In further similarity to Holmes, the First Circuit recently opined that "it is important to remember that the contours of a prima facie case are flexible and situation-specific," Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 719 (1st Cir. 1994), and that:

> [t]he **prima facie** case requirement embodies a concept, not a mechanical exercise. Though its contours generally follow the McDonnell Douglas model, a **prima facie** case must be custom-tailored to fit both the particular animus (e.g., age discrimination, sex discrimination, race discrimination) and the particular type of employment decision involved (e.g., failure to **hire,** failure to **promote,** failure to **retain**).

Id. Finally, like the Holmes court, the First Circuit recognized the underlying purpose of the prima facie case: "[a]ll that is needed is the production of admissible evidence which, if uncontradicted, would justify a legal conclusion of

discrimination." Id. (citing St. Mary's Honor Ctr. v. Hicks, --- U.S. ----, ----, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993)).

Notwithstanding the above Holmes-like approach to the prima facie case, the First Circuit has also articulated the elements of the prima facie case in accordance with the language from this court's opinion in Patterson. See Ramos v. Roche Products, Inc., 936 F.2d 43 (1st Cir. 1991), cert. denied, 502 U.S. 941 (1991). In Ramos, the court held that the plaintiff had established a prima facie case when she "demonstrated by a preponderance of the evidence that she was in a protected class, that she applied for an advertised job, that she was rejected, **and that someone with her essential qualifications was hired**." Id. at 47 (emphasis added) (citing Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 70 (1st Cir.), cert. denied, 469 U.S. 1018 (1984) and Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979)). Thus, like the Fourth Circuit, the First Circuit has not resolved apparent intra-circuit conflict between the various formulations of the prima facie case.

B. The Second Circuit

In Aguirre-Molina v. N.Y. State Div. of Alcoholism, 675 F. Supp. 53 (N.D.N.Y. 1987), the District Court confronted the very factual situation at issue in the Holmes case and in the case below. After reciting the elements of the McDonnell Douglas test, the court commented on the difficulty in applying those elements, and especially the fourth element, to the situation where the position does not remain open and the employer does not engage in continued recruitment. The court stated specifically:

> More problematical in cases like the one at bar, in which an employer's hiring selection is made from a pool of qualified candidates, is the application of the fourth element of the McDonnell Douglas prima facie test, since the decision to hire the successful candidate is made simultaneously with the decision to reject the plaintiff. Obviously, in such circumstances plaintiff cannot show that the position in question "remained open" and that the employer "continued to seek applicants" with qualifications similar to those of the plaintiff after the plaintiff's rejection. . . . There is a split in the circuits on what is required to establish a prima facie case when a position is filled by selecting one individual out of a pool of candidates.

Id. at 58. In finding its way through this thicket, the district court considered and rejected the approach adopted by the Ninth and Tenth Circuits, see Williams v. Edward Apffels Coffee Co., 792 F.2d 1482, 1485 (9th Cir. 1986); Mohammed v. Callaway, 698 F.2d 395, 398 (10th Cir. 1983). Instead, the District Court adopted the Holmes approach explicitly and explained its distinction from the Ninth and Tenth Circuit approaches: "[t]he Fourth Circuit has rejected this approach, which effectively eliminates the necessity of showing anything beyond the first three prongs of the McDonnell Douglas test." Id. In approving the Holmes approach, the court also noted that such an approach was consistent with the Burdine burden placed on plaintiff to show that he or she was qualified, but "rejected 'under

circumstances which give rise to an inference of discrimination.'" Id. (quoting Burdine, 450 U.S. at 253.)

Since 1987, the Second Circuit has neither explicitly rejected nor adopted either of the approaches considered by the district court in Aguirre-Molina. However, the court of appeals has set forth on several occasions a formulation of the prima facie case which conflicts with the Holmes approach. In Petrelli v. City of Mt. Vernon, 9 F.3d 250 (2d Cir. 1993), the Court of Appeals held that "[t]o make out a **prima facie** case of age discrimination, plaintiff must show that (1) he belongs to the protected age group, (2) he applied for and was qualified for the position sought, (3) he was not **hired** despite his qualifications, **and (4) the position was ultimately filled by a younger person**." Id. at 254 (quoting Taggart v. Time Inc., 924 F.2d 43, 46 (2d Cir. 1991)(emphasis added)).

Likewise, in Wrenn v. Dep't of Veteran Affairs, 918 F.2d 1073 (2d Cir. 1990), cert. denied, 499 U.S. 977 (1991), the court of appeals held that "[t]o establish a **prima facie** case, the plaintiff must prove only 'that [he] applied for an available position for which [he] was qualified, but was rejected under circumstances which give rise to an inference of unlawful discrimination.'" Id. at 1079 (quoting Burdine, 450 U.S. at 253).

Nevertheless, the court noted that the plaintiff had alleged that he was qualified for the clerk-typist position for which he applied and that the defendant hired younger, non-minority applicants because of an intent to discriminate against him on the basis of his race and age and stated "[t]hese allegations, if proven, would establish a **prima facie**

case of disparate treatment under Burdine." Id. Therefore, even though the court explicitly recognized that Burdine requires evidence from which discrimination can be inferred, the court found that the mere selection of an applicant not in the plaintiff's protected class allowed such an inference.

Thus, as these cases demonstrate, in the First and Second Circuits, like the Fourth, both at the court of appeals and the district court level, the law remains unclear as to the proper formulation of the prima facie case in the fact situation where the position for which the plaintiff applied and was rejected does not remain and the employer does not engage in continued recruitment.

CONCLUSION

Most hiring decisions today do not occur in the factory setting that occurred in McDonnell Douglas. See Minority Police Officers Ass'n v. City of South Bend, Ind., 617 F. Supp. 1330, 1349 fn. 45, aff'd, 801 F.2d 964 (7th Cir. 1986)(questioning ability of McDonnell Douglas prima facie case to raise an inference in other hiring contexts using multiple applicant pools and simultaneous acceptance and rejection). Accord Shidaker v. Bolger, 593 F. Supp. 823, 838 (N.D. Ill. 1984), aff'd in part sub nom, Shidaker v. Tisch, 833 F.2d 627 (7th Cir. 1986), cert. denied, Frank v. Shidaker, 487 U.S. 1234 (1988) (district court noted that "outside the factory setting the first qualified applicant need not be selected where a choice is made 'on the basis of qualifications, recommendations and subjective impressions.'" (Citation omitted.)) Given that this Court's guidance in multiple applicant, simultaneous selection and rejection situations in Burdine has been largely misunderstood and the

fact that most hiring occurs today in this manner and the results of which comprise much litigation in the federal courts, resolution of the issue, left unresolved by the court below, is one of urgency both to the bench, bar, employees and employers alike of this country.

For the foregoing reasons and because the court of appeals' opinion is in conflict with this Court's opinions, is in conflict with the opinions of other courts of appeals, is in conflict with another opinion within this circuit, and because the issue addressed by the opinion is in conflict throughout the district courts and courts of appeals throughout the country, this Court should issue its writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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March 9, 1995

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OPINION OF THE FOURTH CIRCUIT COURT OF APPEALS

UNPUBLISHED

UNITED STATES COURT OF APPEAL

FOR THE FOURTH CIRCUIT

CHARLES W. PARKER,
Plaintiff-Appellant,

v. No. 93-1297

NORTH CAROLINA DEPARTMENT OF AGRICULTURE, FOOD AND DRUG DIVISION,
Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of North Carolina, at Raleigh.
Malcolm J. Howard, District Judge.
(CA-92-269-5-CIV-H)

Argued: September 28, 1994

Decided: November 14, 1994

Before HALL, HAMILTON, and MICHAEL, Circuit Judges.

Vacated and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Gail Starling Marshall, Rapidan, Virginia, for Appellant. Valerie L. Bateman, Assistant Attorney General,

NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. **ON BRIEF:** Michael F. Easley, Attorney General of North Carolina, Thomas G. Meacham, Jr., NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Charles Parker brought this Title VII action alleging he was not hired for a job because of his race. The district court concluded that Parker failed to allege a *prima facie* case and therefore dismissed his complaint. Because we conclude that Parker did allege a *prima facie* Title VII case, we vacate the district court's judgment and remand for further proceedings.

I.

In December 1990, the North Carolina Department of Agriculture (DOA) advertised a new opening for a chemistry technician. Charles Parker, who is black, and three other candidates (one black, two white) were interviewed for the position. After the interviews were completed, the DOA offered the job to one of the white candidates. The DOA told Parker by letter that someone else got the job.

Alleging that he was not hired because of his race, Parker filed administrative claims with North Carolina's Office

of Administrative Hearings and the United States Equal Employment Opportunity Commission pursuant to Title VII of the Civil Rights Act of 1964. Both agencies investigated his allegation of racial discrimination and found it to be without merit.

After Parker exhausted his administrative remedies, he filed a *pro se* Title VII complaint against the DOA in district court on April 13, 1992. His complaint alleged that he was qualified for the chemistry technician position and that he was not hired because of his race. The DOA filed a motion to dismiss the complaint, contending, among other things, that Parker failed to allege a *prima facie* case of racial discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).[1]

In response to the DOA's motion, the district court ordered the parties to supply it with additional facts on whether Parker could satisfy the fourth *McDonnell Douglas* factor, *i.e.*, "that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications," *id.* at 802. Parker could not satisfy this factor because the DOA did not continue to recruit

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[1] In *McDonnell Douglas* the Supreme Court said that a Title VII complainant's *prima facie* case "may" be established by showing: "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." 411 U.S. at 802.

after it rejected him. Rather, the DOA contemporaneously rejected Parker and the other unsuccessful candidates when it hired the successful white candidate. In a January 4, 1993, order the district court dismissed Parker's complaint on the ground that Parker failed to allege *McDonnell Douglas*'s "continued recruitment" factor:

> [T]he court finds that the plaintiff has not shown that the defendant continued to recruit qualified applicants . . . . Therefore because the plaintiff has not established the fourth element of a prima facie case of racial discrimination, his complaint must be dismissed for failure to state a claim on which relief can be granted.

Parker appeals.

II.

Parker argues that the district court erroneously concluded that a complainant must be able to satisfy the "continued recruitment" factor in order to make out a *prima facie* Title VII case. We agree.

The Supreme Court observed in *McDonnell Douglas* that "[t]he facts necessarily will vary in Title VII cases, and the specification . . . of the *prima facie* proof required from respondent is not necessarily applicable in every respect to differing factual situations." 411 U.S. at 802 n. 13. *See also Furnco Contr. Corp. v. Waters*, 438 U.S. 567, 577 (1978) ("The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic.") *Texas Dep't*

of Community Affairs v. Burdine, 450 U.S. 248, 253-54 n. 6 (1981). For instance, the Supreme Court has sid that a complainant could satisfy the fourth prong of *McDonnell Douglas* merely by showing "that after she was rejected [the employer] *either* continued to seek applicants for the position, *or, as is alleged here, filled the position with a white employee.*" *Patterson v. McLean Credit Union*, 491 U.S. 164, 187-87 (1989) (emphasis added).

Adhering to the clear language in the Supreme Court's Title VII cases, our circuit has said a complainant makes out a *prima facie* case if he or she merely shows, in addition to the first three *McDonnell Douglas* factors, that the successful applicant was white.

> The requirements for establishing a prima facie case of racial discrimination under Title VII are, understandably, law: A plaintiff need only demonstrate she is a member of a protected class, that she applied and was qualified for the position, that she was rejected, and that the employer either continued to seek applicants for the position *or filled it with an applicant who was white*.

Blue v. United States Dep't of Army, 914 F.2d 525, 536 (4th Cir. 1990) (emphasis added) (citing *Patterson*, 491 U.s. at 186), *cert. denied*, 499 U.S. 959 (1991); *see also Carter v. Ball*, 33 F.3d 450 (4th Cir. 1994) ("To satisfy the fourth prong [of the

prima facie case], Carter need only show that the position was filled by a white applicant, as he has done.").

Here the district court found that Parker satisfied the first three *McDonnell Douglas* factors. And the district court found that the successful candidate was white. Consequently, Parker has alleged a *prima facie* case of race discrimination, and the district court erred in dismissing his Title VII complaint.

III.

The district court erred in dismissing Parker's Title VII complaint. Therefore, we vacate the judgment and remand to the district court for further proceedings.[2]

VACATED AND REMANDED

---

[2] In its motion to dismiss Parker's complaint, the DOA also argued to the district court that the complaint should be dismissed on the grounds of insufficiency of process and insufficiency of service of process. The district court declined to reach these alternative grounds for dismissal because it agreed with the DOA that Parker failed to allege a *prima facie* case. Because the district court has yet to consider these alternative grounds, we decline to consider them here. The district court may consider them on remand.

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ORDER ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

FILED: December 9, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 93-1297
(CA-92-269-5-CIV-H)

CHARLES W. PARKER

Plaintiff-Appellant

v.

NORTH CAROLINA DEPARTMENT OF AGRICULTURE, Food and Drug Division

Defendant-Appellee

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

ORDER ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC CONTINUED

The appellee's petition for rehearing and suggestion for rehearing inbanc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and suggestion for rehearing is banc are denied.

For the Court

/s/Bert M. Montague
Clerk

DISTRICT COURT ORDER OF DECEMBER 30, 1992

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
RALEIGH DIVISION

No. 92-269-CIV-5-H

CHARLES W. PARKER,	)	
	)	
Plaintiff,	)	
	)	
V.	)	ORDER
	)	
NORTH CAROLINA STATE GOVERNMENT, FOOD AND DRUG DIVISION, DEPARTMENT OF AGRICULTURE,	)	
	)	
Defendant.	)	

This matter is before the court on the defendant's motions to dismiss and for a protective order. The court previously considered these matters and, by order dated october 29, 1992, directed the parties to file additional documentation. The plaintiff and defendant submitted supplemental memoranda and affidavits. Thus, this matter is now ripe for ruling.

STATEMENT OF FACTS

Plaintiff, proceeding in forma pauperis, brought this employment discrimination action under Title VII of the Civil Rights Act of 1964 against the defendant after his application for employment as a Chemistry Technician was rejected. In May

1990, plaintiff, a black male, applied for a position as a Chemistry Technician with the Food and Drug Division of the North Carolina Department of Agriculture. Before the position was filled, the General Assembly abolished it. In December 1990, the defendant advertised a new opening for a Chemistry Technician position. Plaintiff applied for this position and was interviewed on January 31, 1991. Three other applicants were also considered for the position. Ultimately, the position was offered to and accepted by a while female.

The plaintiff filed administrative claims with the North Carolina Office of Administrative Hearings and the United State Equal Employment Opportunity Commission. Upon investigating plaintiff's allegations of racial discrimination, both agencies determined his claims to be without merit.

After his administrative remedies were exhausted, the plaintiff filed this action on April 13, 1992. The Plaintiff served two employees of the defendant -- Mr. George Winstead, III, the individual who conducted plaintiff's interview, and Ms. Sherry Lee, and employee in the Personnel Services Division -- with a copy of the summons and complaint by certified mail, return receipt requested. The summons, dated May 18, 1992, was received by the defendant's employees on May 20, 1992, and May 21, 1992, respectively. The defendant's process agent, mr. David S. McLeod, Director, legal Staff, was never served with a copy of the summons and complaint.

DISCUSSION

The defendant raises three alternative grounds for dismissing the plaintiff's complaint. First, the defendant contends that the complaint must be dismissed pursuant to Fed. R. Civ. P. 12(b)(4) and 12(b)(5) for the plaintiff's failure to promptly serve the summons and complaint upon the defendant. Second, the defendant argues that this court lacks personal jurisdiction over its because the plaintiff failed to perfect service of process upon the defendant's process agent, as required by Fed. R. Civ. P. 4(d)(6). Third, the defendant moves to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

In its initial review of the pending motions, the court considered whether the plaintiff satisfied his burden of showing a prima facie case of racial discrimination. The court found that the record lacked sufficient information on the final element of the plaintiff' prima facie case and ordered the parties to submit additional documentation.

After reviewing the supplemental documentation submitted by the parties, the court finds that the complaint fails to state a claim upon which relief can be granted. Therefore, the court will not address the defendant's challenges based upon the sufficiency of the service of process. In addition, because this action must be dismissed, the defendant's motion for a protective order is now moot.

To establish a prima facie case of racial discrimination, the plaintiff in a Title VII action must demonstrate that 1) he is a member of a racial minority; 2) he applied and was qualified for a job for which the employer was seeking applicants; 3) he

was rejected; and 4) after his rejection, the employer continued to seek applicants with the plaintiff's qualifications. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

As stated previously in the order of october 29, 1992, the plaintiff's complaint alleges the first three elements of a prima facie case of racial discrimination under Title VII. In response to the court's request for additional documentation on the issue of continued recruitment, the plaintiff submitted a memorandum repeating allegations regarding the legality of the General Assembly's abolishment of the Chemistry Technician position advertised in mid-1990 and contending that the defendant's continued recruitment could be inferred from the lack of evidence of an appointee.

To rebut the inference of continued recruitment proffered by the plaintiff, the defendant submitted the sworn affidavits of George R. Winstead, III, and Sherry W. Lee. Both affiants state that after the position for which the plaintiff applied was filled, no further recruitment of Chemistry Technicians occurred.

Based upon the supplemental documentation submitted by the parties, the court finds that the plaintiff has not shown that the defendant continued to recruit qualified applicants. The defendant's evidence sufficiently rebuts any inference raised by the plaintiff that qualified applicants were recruited for the position after his rejection. Therefore, because the plaintiff has not established the fourth element of a prima facie case of racial discrimination, his complaint must be dismissed for failure to state a claim upon which relief can be granted.

ORDER AND JUDGMENT OF DISTRICT COURT CONTINUED

CONCLUSION

Accordingly, the court hereby GRANTS the defendant's motion to dismiss and DISMISSES this action pursuant to Fed. R. Civ. P. 12(b)(6). In light of the court's ruling on the defendant's motion to dismiss, the defendant's motion for a protective order is now moot.

This the 30th day of December, 1992.

/s/Malcolm J. Howard
MALCOLM J. HOWARD
United States District Judge

At Greenville, North Carolina
#19

ORDER AND JUDGMENT OF DISTRICT COURT CONTINUED

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA

CHARLES W. PARKER,

JUDGMENT IN A
CIVIL CASE

Plaintiff

v.

NORTH CAROLINA STATE GOVERNMENT,
FOOD AND DRUG DIVISION,
DEPARTMENT OF AGRICULTURE, CASE NO:
92-269-CIV-5-H

Defendant.

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xxx **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff have and recover nothing of defendant and this case is hereby dismissed.

ORDER AND JUDGMENT OF DISTRICT COURT CONTINUED

THIS JUDGMENT WAS FILED & ENTERED THIS 4th DAY OF JANUARY, 1993, & COPIES MAILED TO:

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January 4, 1993 — Date

/S/DAVID W. DANIEL — Clerk

(By) Deputy Clerk